

EXHIBIT 8

IN RE: OPIOID LITIGATION
Hearing on 03/13/2020

1 IN THE CIRCUIT COURT OF
2 KANAWHA COUNTY, WEST VIRGINIA

3

4

5 IN RE: OPIOID LITIGATION Civil Action No. 19-C-9000

6

7 MASS LITIGATION PANEL

8 Alan D. Moats - Lead Presiding Judge
9 Derek C. Swope - Presiding Judge

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11 * * *

12 HEARING

13 * * *

14 BEFORE: The Honorable Alan D. Moats, Lead Presiding
15 Judge, and The Honorable Derek C. Swope, Presiding
16 Judge, in the Kanawha County Courthouse, Ceremonial
17 Courtroom, Charleston, Kanawha County, West Virginia, at
18 10:05 a.m., on the 13th day of March, 2020.

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1 * * *

2 P R O C E E D I N G S

3 * * *

4 JUDGE MOATS: Good morning, everyone.

5 Thank you all for coming.

6 I'm surprised as many people are here, once we
7 got the option for people to listen remotely. And that
8 just came in two or three days ago. And at that time, I
9 assumed that we had conference-call capability here.
10 I'm sure there are some people listening remotely. All
11 they can do is monitor. We don't have the capacity for
12 anybody out of this courtroom to speak.

13 But this is the ceremonial courtroom here in
14 Kanawha County, and so it's only used for special
15 functions. And I was not aware -- didn't become aware
16 until Wednesday that we did not have the capacity for
17 calling. So Thursday morning, bright and early, about
18 7:00 o'clock, I called the Supreme Court IT director,
19 Pat Moats, and asked if she could try to come up with a
20 system so this could be broadcast, in light of what's
21 happening in our country.

22 And so it seemed like a very simple deal,
23 because I guess in technology we're just accustomed to
24 it working, we don't understand that somebody has to

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1 make it work. So she and her staff, working with the
2 staff here in Kanawha County, John Caudill, the
3 facilities director, and other people here came up with
4 this system. And so from here on out we are going to
5 attempt to utilize this.

6 We don't know how long this national situation
7 is going to go on. But even once it is resolved, it may
8 be helpful for those people who have other obligations,
9 particularly people traveling across country, cost, and
10 all those kind of things. So this is going to be
11 something we will continue to do as time goes on.

12 Now, it's critical today that the only people
13 who can speak are at the podium. This sound system or
14 Skype system is wired directly into my microphone,
15 Judge Swope's microphone and the microphone at the
16 podium. So if somebody tries to speak at counsel table
17 or someplace else in the room, that is not going to pick
18 up.

19 Now, things have come quite a ways since we
20 were last here in early December, and we also understand
21 things have come a way in the federal system, with the
22 trial now having been scheduled by Judge Faber for late
23 August, pertaining to Cabell County and the City of
24 Huntington.

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1 And we appreciate Mr. Meadows and Mr. Linkous
2 furnishing us with an update, as far as what is
3 happening nationally. We note that there are many cases
4 that are set for trial here over the next one to two
5 years, including many in this year that we are currently
6 working in. And along those lines, we want to come up
7 with a reasonable time frame for a trial in this case.
8 We will be coordinating with Judge Faber. For
9 Judge Swope and I, Judge Faber is somebody we look up
10 to, always have. He is an outstanding federal judge,
11 one of the best. And so we look forward to coordinating
12 our efforts with him. And I have already told him that
13 we are not going to do anything in our case that is
14 going to be in conflict, timewise, in his case.

15 And so we have looked at the memorandum
16 submitted by the Defendants, stating that they need
17 18 months to conduct discovery. We don't believe that's
18 necessary. Were it not for that federal case, we would
19 be probably looking at a trial this fall. However, we
20 cannot do that in light of that trial that's going to go
21 on from August through the end of this year. So we are
22 looking to set trial in this case to begin March 22,
23 2021.

24 We believe that is a reasonable time period,

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1 in light of the requests of the Defendants and the
2 concerns of the Plaintiffs. They've said before, they
3 are ready to go forthwith. We see no way it can be done
4 before the federal trial in August. We still have cases
5 coming in. There were new cases filed very recently.
6 I'm sure there will be motions pertaining to those, as
7 there have been in all of the other cases, that we will
8 need to deal with and matters that we need to consider
9 and rule on.

10 We've had a motion to reconsider, filed this
11 week, on our past ruling. We had a motion come in last
12 night wanting to submit briefs. I think that was by
13 Mr. Williams, who just recently came into the case. I'm
14 going to give everybody two weeks to file anything you
15 want to file in that regard, and we're going to look at
16 it.

17 However, back in December, we related -- we
18 told you that we believe this is about public nuisance.
19 Judge Polster told everybody in the federal case that's
20 what the case is all about. He asked the Plaintiffs to
21 pare down their theories. He only agreed to send the
22 case back to Cabell County, or the Cabell County and
23 Huntington case back to West Virginia, if those
24 Plaintiffs did that. They agreed. Ultimately, they

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1 gave up numerous causes of action.

2 I said before, this case has the capacity to
3 outlast any case we've ever dealt with. The longest
4 case we've dealt with was 22 years. That was the
5 tobacco litigation that started in 1998. We entered an
6 order last Friday, March 6, that dismissed that tobacco
7 litigation in its entirety, after 22 years. Had a
8 torturous route through our state's Supreme Court,
9 United States Supreme Court, attempts to select juries.
10 And this has the same capacity.

11 Now, we understand that there are
12 disagreements, and there's always going to be
13 disagreements, as far as what we've done. I can tell
14 you we are not inclined to revisit this issue of a
15 nonjury trial. Quite frankly, we disagree with the
16 Defendants' position. This is an equitable matter, and
17 if we don't address it, years and years, decades will go
18 by before something as critical as a public health
19 crisis is addressed. We don't believe that's what our
20 law was set up to do. And if we allow this case to
21 languish for 5 years, 10 years, 15, 20, 30 years, then
22 that means our legal system has failed. And we're not
23 going to let that happen.

24 And so we are not inclined to reconsider this

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1 nonjury trial on the public nuisance, because our
2 position is as we said. It's an equitable matter, we
3 believe we have the authority.

4 Now, I'm sure the Supreme Court may be asked
5 to tell us we don't. And we understand that. And if
6 they tell us we don't, then we will go back and we'll
7 start at the beginning.

8 You have talked about the statutes. There
9 were three statutes: Chapter 16, Chapter 7, Chapter 8.
10 You all know what they are. We put in our order, we
11 looked at Chapter 16. I asked you the last time to tell
12 me the ordinances that you were working under. Never
13 saw an ordinance.

14 We're not saying that there's no authority
15 under those other two statutes, we just weren't quite
16 satisfied with the Plaintiffs' responses. So you have
17 the opportunity to look at that again, as the Defendants
18 have filed this motion for us to reconsider.

19 As far as the discovery is concerned, the
20 Defendants are saying: We need to depose every single
21 entity -- plaintiff-wise -- every county commission,
22 every city, to see whether there was an unreasonable
23 interference with the public weight in each of those
24 areas.

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1 Now, the memo that Mr. Linkous and Mr. Meadows
2 submitted says that there are approximately 3,000 of
3 these cases pending nationally, and in 49 states and
4 territories. 3,000. Does that mean that there has to
5 be showing that there is a public nuisance specifically
6 related to every one of those 3,000 places? That
7 doesn't make much sense.

8 Right now we're dealing with a virus. Viruses
9 know no boundaries. From wherever we all came from
10 yesterday, it knows no boundaries. And it's illogical
11 and unreasonable to think that somehow a public nuisance
12 that is alleged to not be in just this state but in
13 every state, somehow stops at the boundaries of the
14 municipality, a county, or a state for that matter.

15 It appears from what we have been able to
16 determine, this thing has been discovered to death so
17 far, in the federal MDL. It continues to be discovered
18 to death in the Cabell County, Huntington case. So you
19 all are going to have the benefit of all of them.

20 So we are not going to open up discovery for
21 every county and every city. We said before we would
22 look at a specific county, city, hospital, so you can
23 get an idea what the allegations are, as far as
24 abatement is concerned.

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1 Now, the Defendants say: Well, these are
2 damages.

3 Well, we disagree with that. Judge Polster
4 disagrees with that. He said the abatement is a cost,
5 not a damage, recognized as such. And that's how we
6 look at it as well.

7 So we are going to -- you're going to have
8 Cabell County and Huntington. We are going to allow
9 specific discovery on all the issues for one county, one
10 city, one hospital. And we have chosen an area where
11 there all three, hospitals, together: the County of
12 Harrison, City of Clarksburg, United Hospital Center.

13 The allegations by the Plaintiffs say the
14 Defendants flooded not just Clarksburg, not just
15 Harrison County, but the entire state with opioids. It
16 knows no boundary, because every other state is saying
17 the same thing. But this will be the opportunity to
18 conduct discovery to see what kind of costs a typical
19 county, city and hospital say they have incurred, or
20 will continue to have to put out to abate what they say
21 is a nuisance. You're going to have that very soon in
22 Cabell County and Huntington.

23 And if here, over the next few months, it
24 appears that we need to expand that, then you can file

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1 an appropriate motion and we will consider that.

2 We have cases filed by the State of
3 West Virginia, by the Attorney General. The Attorney
4 General has filed a motion very recently wanting an
5 expedited trial. We haven't even dealt with motions to
6 dismiss in those cases yet, at least in one of them.
7 And one of them, another case, in Endo Health Solutions,
8 to my knowledge, hasn't even come to the panel yet. Is
9 it going to? Probably.

10 Our position is going to be we are going to
11 focus like a laser on public nuisance. If somebody has
12 a severed artery, nobody worries about who caused it,
13 they worry about how to stop the bleeding, and then
14 later figure out what the cause of that was.

15 And so to the Attorney General, the punitive
16 statute of consumer credit protection can all be done in
17 good time. We will look and see is it possible to take
18 that up at a bench trial. Because it would be a bench
19 trial as well. I don't know the answer to that. We'll
20 all have to discuss that, consider it, and make a
21 decision as we go along.

22 We had an issue, I think Mr. Williams raised,
23 on res judicata. He's shaking his head "yes." So
24 that's going to have to be dealt with. It's my

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1 understanding from the case in federal court that there
2 are issues of res judicata pertaining to the distributor
3 defendants in prior cases that were brought by the State
4 of West Virginia, the Attorney General, DHHR, I believe
5 Division of Military Affairs, and whether a settlement
6 in those cases somehow is going to adversely impact
7 municipalities, counties. That has not been brought to
8 us yet, but it's my understanding Judge Faber is going
9 to be taking up that issue.

10 And so I'm sure somebody at some point in time
11 is going to file that motion here before us as well.

12 Last week, or the week before, there were
13 14 new cases filed in Marshall County. I would assume
14 that you all are going to get together and come up with
15 an agreed order to transfer those to the panel.

16 I hope that you will think seriously about the
17 motions to dismiss that you're going to be filing. We
18 have spent countless hours, days and weeks working on
19 all the other motions to dismiss. You all have taken
20 those to the Supreme Court, twice, with the same result.

21 You're looking here at me, Judge Swope, our
22 mass litigation manager, who is our law clerk, Kim
23 Fields. We're it. In addition to our regular dockets
24 and the other things we do. You say: Well, those two

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1 judges are pretty boring people.

2 And you're right, we don't have much of a life
3 outside of what we do in our profession. And we are not
4 complaining about that. But the point is, we do not
5 have unlimited time and resources, and so we have to try
6 to work as smart as we can with the time that we have.
7 But we are willing to work harder, regardless. And we
8 do.

9 I would like to hear from the Attorney
10 General's office. Who's here for the AG?

11 MS. SINGER: Linda Singer, Your Honor.

12 JUDGE MOATS: I need you to come to the
13 microphone. And I need you to put your name on the
14 record, who you represent, first of all, for all the
15 throngs of people listening out and around the country.

16 MS. SINGER: Linda Singer, Your Honor,
17 Motley Rice, for the Attorney General's Office. And,
18 I'm sorry, you had directed us to speak up here, so my
19 apologies for that.

20 In terms of what the panel would like to hear,
21 I'm happy to speak.

22 JUDGE MOATS: Well, what I've just talked
23 about. You asked for an expedited trial in two months.
24 We haven't even dealt with motions to dismiss. How in

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1 the world would we do that?

2 MS. SINGER: So we recognize that we
3 submitted an aggressive schedule. We think for all the
4 reasons that Your Honor spoke to, that's appropriate in
5 this case. Plus the fact that -- I think there are
6 really three reasons. The first is that while the
7 Attorney General's cases are new to this panel -- and I
8 can update the panel to say that you now have the case
9 against Janssen and Johnson & Johnson, the case against
10 Teva -- the Attorney General's Office did not oppose the
11 transfer of the Teva case to the Mass Litigation Panel.

12 Mallinckrodt and Endo are the two outstanding
13 cases that the Attorney General's Office has filed.
14 Those have been served. And as with Teva, the Attorney
15 General's Office is not going to oppose the transfer of
16 those cases into the Mass Litigation Panel.

17 So those will be four cases. These cases
18 against the manufacturers of the opioids actually date
19 back even before the multidistrict litigation before
20 Judge Polster. They were filed originally in 2014.
21 There has been extensive discovery involving these
22 defendants.

23 We recognize that motions to dismiss have been
24 filed. The State will file its first reply on Monday,

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1 and promptly to other motions thereafter. We recognize
2 the burden on this panel and the need for you to
3 consider those motions. That's no reason, we believe,
4 to stop discovery in this case.

5 JUDGE MOATS: Well, let me ask you this.

6 The last cases the Attorney General filed,
7 where there were settlements filed against the
8 manufacturer, against the distributor defendants --
9 McKesson, AmerisourceBergen and Cardinal Health -- that
10 took five years. They were filed in 2012, and there was
11 a settlement early January 2017. These cases are filed,
12 and you want us to go to trial in two months. It makes
13 no sense.

14 MS. SINGER: So the points I would make to
15 that remark, obviously, that is, in fact, what happened.
16 Those were the first cases filed against distributors in
17 the country. They took an incredible amount of work to
18 prepare, to conduct discovery, and for the legal issues
19 to be resolved. This panel does not face the
20 manufacturer cases on a blank slate.

21 JUDGE MOATS: Okay. Let me interrupt you.

22 Why should we focus on those issues that are
23 punitive in nature as opposed to what I said before,
24 having laser-light focus on public nuisance? Which is

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1 the most important?

2 MS. SINGER: I think there's no question
3 that the State of West Virginia, like the other
4 Plaintiffs before the panel, and the panel itself
5 recognizes that public nuisance is a critical remedy in
6 this case. I think they're -- again, a number of
7 reasons. One is that the case under the West Virginia
8 Customer Credit Protection Act is a streamlined case.
9 It doesn't require discovery of the State. I know
10 Janssen has raised issues that required discovery. We
11 think it's very streamlined. I'm happy to go into that.

12 The second is that the finding on deceptive
13 and unfair conduct would be an element of the public
14 nuisance case too.

15 JUDGE MOATS: Well, then you may need to
16 bring that into public nuisance. Because we respect
17 what you're saying, but it's not going to happen. We
18 are going to focus -- again, at the risk of being
19 redundant, which I am -- like a laser on public
20 nuisance.

21 Now, the next question is -- I asked this back
22 in August: Is the Attorney General going to file any
23 more? We have all of these defendants here. I asked in
24 August: Are there going to be any more cases filed?

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1 And I was told: Can't answer that question.

2 You know what? Two more were filed within
3 24 hours.

4 Judge Swope and I were shocked. And I don't
5 quite understand. We have several questions. We have,
6 what, 30-some cities, 26 county commissions who have
7 filed against all these defendants. And I'm sure they
8 want to know: Are they going to be subject to more
9 lawsuits here over the next few months? Or if there's
10 some kind of agreement that doesn't pertain to the
11 State, is the State going to come back a year from now,
12 or two years from now, and do the same thing? Is this
13 going to be neverending?

14 If this is a public nuisance, does the
15 Attorney General believe that the defendants it has not
16 sued, were not guilty of engaging in causing a public
17 nuisance?

18 Those are questions we don't understand the
19 answers to.

20 MS. SINGER: And they are questions that I
21 think the panel is going to remain frustrated by no
22 response to. I know Mr. Sizemore is still recovering
23 from the last discussion.

24 JUDGE MOATS: We're not trying to berate,

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1 but we just don't understand. We just want -- we want
2 finality. And we've tried that from the beginning.
3 That's what we're trying to do. That's why I suggested
4 at the beginning that we need to try to have a
5 West Virginia solution.

6 Ohio has come out with their Ohio One Plan,
7 where all the cities and State had gotten together.
8 They've come to some agreement. That's what we need
9 here.

10 MS. SINGER: So to respond to a number of
11 those issues. The Attorney General and the Attorney
12 General's Office regards this issue as, I think, the
13 number one priority for this office, that's why it was
14 so far out ahead on the distributor case. But both the
15 AG's Office has a responsibility to investigate its case
16 thoroughly, to bring those cases that it has determined
17 it can bring, based on the investigation it's conducted.
18 It's also very bound, as this panel recognizes, by
19 confidentiality restrictions, on the status of its
20 investigations, so --

21 JUDGE MOATS: What about public nuisance?
22 Surely to goodness you all have the same access to all
23 this discovery as everybody else does. Are you going to
24 file or join in or attempt to join these defendants for

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1 public nuisance? Or is that going to come up somewhere
2 down the road? Or are you prepared to state on the
3 record: No, we're not going to go after any of the
4 other defendants that we haven't sued for public
5 nuisance.

6 MS. SINGER: I'm certainly not prepared to
7 say on the record that the Attorney General's Office
8 will not be bringing additional cases. The Attorney
9 General's Office is investigating wrongdoing and
10 potential litigation against every participant in this
11 crisis.

12 JUDGE MOATS: And I understand that. But I
13 had that answer given to me in August.

14 Here we have public nuisance. We have said we
15 are going to have a public nuisance trial pertaining to
16 everybody, every plaintiff, every defendant, everybody,
17 including the State of West Virginia.

18 You say the State of West Virginia has a
19 common-law right to bring it. And we don't disagree
20 with that. But right now you just brought it against a
21 few defendants. Are you going to come back after we do
22 all this and say: We want to do it again, because we
23 have not abated against all these defendants on behalf
24 of the State.

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1 MS. SINGER: So, again, I cannot speak to
2 the status of any current investigation. I can tell the
3 court that -- the panel that, first, we have now
4 proceeded against the manufacturers. The AG's Office
5 previously proceeded against the distributors, not just
6 the big three, but a dozen or so distributors. There
7 are obviously other defendants before this court, but
8 the Attorney General has an obligation to move speedily
9 but deliberately. I can assure the panel that it is not
10 the Attorney General's Office intention to be a
11 bystander in this process. To the extent it brings
12 other cases, it will bring them as rapidly as it can
13 before the panel so that it can be a full participant.

14 JUDGE MOATS: Now, see, that tells us
15 nothing whatsoever. It's been several months since I
16 got that last answer. I'm setting a trial a year out.
17 Several months from now, am I going to get the same
18 answer?

19 I don't know. It just doesn't make any sense
20 to me. And I know it doesn't to Judge Swope, because we
21 have discussed this in detail.

22 If this is such a public crisis, such a public
23 health crisis in this state, then we don't understand
24 where the State is. To say, "We need to be deliberate;

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1 we need to take months and years to investigate; and we
2 will do it in our own good time" -- makes no sense to
3 us. Period.

4 Now, I understand your position. But if we
5 adopted that position, then we would be saying: Yes,
6 Defendants, we're going to give you a jury trial, and
7 we're going to set it in the year 2037. Because we want
8 to be slow and deliberate and take our time, dot every
9 single "I," cross every single "T." That's all we're
10 asking for.

11 We told you we want the law to work, as it
12 should work. That's what our obligations are, and as
13 judges, to try to move this, to respect the rights of
14 the Defendants, but to recognize we have these
15 allegations of a public health crisis, and to try to
16 strike a balance. And so we're not asking anything
17 unreasonable out of the Attorney General's Office.

18 We have studied the statute, Chapter 16.
19 Whether you agree with it or not, it says the State
20 Director of Health has the same authority. No
21 departments, only the State can join in. It's strictly
22 the Attorney General filing this action.

23 I would think that you would be working with
24 all these lawyers. We've got some of the best lawyers

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1 in the state, in the country here, to confer, to work
2 together. And that's what needs to happen. There needs
3 to be complete, total cooperation, working together to
4 come up with a solution. And the solution is not:
5 Let's wait six more months, ten months, a year, two
6 years.

7 That's not what I'm asking from you.

8 MS. SINGER: So -- and, I'm sorry, I
9 certainly don't mean to interrupt, Your Honor. I would
10 just say that it is not that the State of West Virginia
11 has sat back, to leave others to resolve this problem,
12 or that it has not brought every sense of urgency to
13 this crisis. It was involved in this litigation before
14 this group was involved in it. It has proceeded with
15 enormous dedication and determination, not just on the
16 distributor litigation, now the litigation against
17 manufacturers, but in developing with other parties a
18 proposed plan to abate the crisis. It has worked in
19 other litigation outside of this panel. I'm sure the
20 panel is aware of it. So it's not simply that the
21 Attorney General's Office hasn't focused on this issue.

22 And as a sovereign, as a law enforcement
23 official, it has an obligation to move deliberately and
24 appropriately and with speed to participate in this

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1 process. And I can sure you that it is doing that. And
2 it doesn't intend to wait until this process resolves
3 itself.

4 JUDGE MOATS: All right. Thank you.

5 One thing I would like all of you to consider
6 is, in this Cabell County and the Huntington case, is to
7 be thinking -- depending on what happens -- and I know
8 there are a lot of variables. There's these motions to
9 dismiss for res judicata. Judge Faber, I'm sure, will
10 be addressing that. But in the event that there would
11 be a finding by Judge Faber, after a trial, that shows
12 there's public nuisance or something else, is that going
13 to constitute collateral estoppel to those three
14 defendants?

15 I'm sure that will be something we will
16 consider as time goes by as well.

17 The next thing I understand and I know, and I
18 talked to Judge Faber, and he's issued an order
19 appointing retired Senior Status Judge Christopher C.
20 Wilkes as special master in the federal case. And we
21 talked before, and I asked all of you to come up with
22 some names, as far as a discovery commissioner here.
23 And Judge Wilkes was one of the names you all came up
24 with.

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1 And so it's our intention to appoint
2 Judge Christopher C. Wilkes as discovery commissioner.
3 And we will pretty well mirror Judge Faber's orders, as
4 far as the duties, the authority of the discovery
5 commissioner, the compensation will be the same as set
6 by Judge Faber.

7 We believe it's very important that we have
8 the same discovery commissioner, so we don't have
9 dueling discovery decisions that would be very
10 problematic. And I'm hoping that Judge Wilkes will be
11 able to handle that double-duty with his time.

12 Ms. Chafin has sent a letter to the court, for
13 the second time, asking us to make a request of
14 Judge Polster to put more on our plate. I told you the
15 last time my thoughts about asking for second helpings.
16 However, I would like to know: How many West Virginia
17 cases are pending in the MDL? Can somebody answer that?

18 Ms. Chafin, come forward, state your name and
19 who you represent.

20 MS. CHAFIN: Your Honor, Letitia Chafin, on
21 behalf of 32 counties and cities, that we represent all
22 the state court claims, near-identical defendants as to
23 the ones pending before -- some are pending before the
24 panel in the Mass Litigation Panel, where we are today.

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1 Twelve of them are removed -- have been removed and are
2 pending in the MDL.

3 I'm aware of only the 12 -- our 12 clients
4 that were removed -- that have state court claims that
5 have been removed and are still pending in the MDL.

6 JUDGE MOATS: And my question is: How many
7 other cities or counties are in federal court, from
8 West Virginia? Do we have somebody else --

9 MR. JESSEE: Your Honor, if I may.
10 Russell --

11 JUDGE MOATS: Wait just a second. Speak
12 into the mic.

13 MR. JESSEE: Russell Jessee, I represent
14 McKesson, and I'm John Meadows' body double today.

15 I have been tracking these. I believe that in
16 the MDL there are 70 total cases with West Virginia
17 plaintiffs, 24 counties, 38 municipalities. And so
18 that's 62.

19 And then -- actually, there may be -- there
20 may be 72 total, because I believe there are ten others
21 in addition to the governmental entities. So,
22 actually --

23 JUDGE MOATS: What kind of others?

24 MR. JESSEE: I'm sorry?

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1 JUDGE MOATS: What kind of others?

2 MR. JESSEE: Others include personal injury
3 actions, there's six NASBA actions, and two personal
4 injury wrongful death actions. There's also one
5 insurance premium purported class action, based on
6 increased insurance premiums. And there is a union
7 first-party payer matter, Employer Teamsters Local 175
8 and 505, and they were --

9 JUDGE MOATS: Are you all going to file any
10 kind of response to that letter?

11 MR. JESSEE: Well, Your Honor, the
12 circumstance of state court judges asking Judge Polster
13 to sua sponte remand some cases to state court --
14 Judge Polster issued an order last year sometime, and I
15 don't remember exactly when, that said that he would
16 entertain those requests for a limited period of time.

17 There were only two state court judges that
18 made those requests. I can't remember both of them.
19 One of them was Missouri. And Judge Polster remanded --
20 I think it was Pennsylvania, was the other one.

21 But Judge Polster remanded those specific
22 cases requested at that time, and said at that time: No
23 more; I'm done with this.

24 JUDGE MOATS: Well, I understand that. But

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1 I guess if both sides would go to Judge Polster and say:
2 Hey, we would like to have this done, it makes sense, we
3 can resolve them all in one fell swoop -- that would be
4 what would seem to make sense, if both sides agree.

5 MR. JESSEE: And at this time I don't have
6 a poll of defendants to have a position on that.

7 JUDGE MOATS: So I guess, Ms. Chafin, our
8 response is: We understand your position. And our
9 position from day one is: Let's attempt to resolve all
10 the West Virginia cases here, at one time.

11 Judge Polster told the Plaintiffs you all have
12 thrown in everything but the kitchen sink in this
13 litigation. Now, there's quite a divergence on public
14 health crisis, fraud, misrepresentation, clear down to
15 negligence. It just seems so contrary. Negligence to
16 intentional creation of a public health crisis. And I
17 think that's what Judge Polster got it. Get rid of all
18 this extraneous stuff and let's deal with this for what
19 it really is, what I said at the beginning.

20 Well, Judge Swope said at the beginning, this
21 is a case of public nuisance. That's what it's all
22 about. That's what other states are looking at.

23 The Defendants, when they asked us to
24 reconsider our order, said: Well, the reason we agreed

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1 to a nonjury trial before Judge Faber was because the
2 Plaintiffs conceded certain positions.

3 Do the same thing here. If you Plaintiffs are
4 so confident in your cases, as you seem to be, in the
5 hundreds of pages constituting complaints, then stand
6 behind it. Go to the Defendants and say: We get rid of
7 all that stuff. We get rid of all this stuff in federal
8 court if you agree to bring these things back. We unite
9 and do this and wrap it all up in one case.

10 And so that's the way, then you all can go
11 united to Judge Polster and say: Judge, we have a
12 proposal.

13 MS. CHAFIN: Your Honor, may I just address
14 three points?

15 JUDGE MOATS: Go ahead.

16 MS. CHAFIN: One is that you can't talk
17 about public nuisance without mentioning the southern
18 West Virginia clients that I identified in my letter. I
19 mean that's --

20 JUDGE SWOPE: What do you think I do all
21 day?

22 MS. CHAFIN: I know, Your Honor, you
23 know -- both of you know, as well as anybody, that abuse
24 and neglect proceedings, the criminal trials, they take

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1 up more than 90 percent of your docket, I'm sure.

2 JUDGE MOATS: Well, Ms. Chafin, right now,
3 just last week we have the City of Buck in this case.
4 And I guess I disagree with them. Because that's
5 contrary to what I said before.

6 This knows no boundary. It's alleged in all
7 the states, at least 49 of them. And so, yes, what's
8 alleged in southern West Virginia is terrible. What's
9 alleged in all the other counties and all the other
10 counties in every other state. We are not making a
11 judgment call. But all we are saying is that it's not
12 confined.

13 And so to show that there is a public
14 nuisance, it's not going to be. But we have to show
15 that it was a public nuisance in Ravenswood, it was a
16 public nuisance in Philippi.

17 There's -- I assume that there's going to be
18 evidence, as you say, that it was so widespread, it's
19 everywhere. And that's what it's going to be.

20 So, again, if you all want to get together,
21 that's fine. But Judge Polster already issued an order,
22 he said: Don't do it.

23 We're not going to do it, unless Judge Polster
24 says otherwise. He said: No, don't come here, don't

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1 ask for it.

2 We're not going to violate his order. But if
3 you all get together and come up with an agreement, then
4 he may say: This makes sense.

5 MS. CHAFIN: Since those orders, the one
6 thing I would just notify the panel about is, it's my
7 understanding that Judge Polster -- because this is an
8 ever-changing litigation, as the panel is well aware of.
9 It's my understanding that Judge Polster would be
10 receptive to --

11 JUDGE SWOPE: Why don't you all file a
12 motion there, then?

13 MS. CHAFIN: Well, it was -- Your Honor, I
14 will. We debated whether we should file a motion or a
15 letter. It was -- we felt it was maybe a little awkward
16 to file a motion for you to write a letter. But if you
17 would prefer it to be in that vehicle, I'd be happy to
18 do it. As the court indicated, we have two weeks to
19 file briefs.

20 JUDGE MOATS: All right. But Judge Polster
21 already told us. He entered an order. He said: Don't
22 ask, because I'm not doing it.

23 It's up to you all to ask him to reconsider.
24 Or else come to this other resolution. That makes sense

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1 to us. We've talked --

2 JUDGE SWOPE: Absolutely.

3 MS. CHAFIN: Thank you, Your Honor.

4 JUDGE MOATS: You're welcome.

5 JUDGE SWOPE: Let me ask: Who's the
6 head honcho on the defense side? Mr. Williams? You got
7 the Cheshire cat grin. Are you the boss over there?
8 Implicitly, if not --

9 JUDGE MOATS: We heard Mr. Meadows went to
10 France.

11 JUDGE SWOPE: Yeah, he's stuck in Nice.

12 MR. WILLIAMS: He did. And with any luck
13 he won't be let back in.

14 JUDGE MOATS: If Mr. Meadows is listening
15 right now: Hello, Mr. Meadows.

16 JUDGE SWOPE: Bonjour.

17 MR. WILLIAMS: Hopefully he is listening.
18 I'm not the head honcho here.

19 JUDGE SWOPE: Well, let me ask you this:
20 You're a smart guy. We have you in all sorts of cases.

21 Wouldn't it make sense for you all to sit down
22 on your side of the table and say: Hey, guys. Hey,
23 ladies. We can get rid of punitive, we can get rid of
24 all of this other extraneous stuff.

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1 You know, if we'll go to them and they come to
2 us and say: Hey, we're willing to focus on public
3 nuisance, and we'll give up our right to a jury trial,
4 you give up your right to a jury trial, we just do this
5 on the simple issue that we're proposing -- all the
6 other -- I used to be a plaintiff lawyer, I was with the
7 Board of Governors. Mr. Majestro was a defense lawyer
8 when I was on the Board of Governors for the Plaintiff
9 Bar, okay.

10 Why can't you all just sit down together, use
11 some common sense, and do what Judge Moats has proposed?

12 And I'm just, philosophically, picking on you.
13 But this is for everybody sitting over here. Apply some
14 common sense, try and get this back here in a simple way
15 that we can get rid of it. As opposed to, you know --
16 they'll find my skeletal remains before this gets
17 finished, if you go the old-fashioned way.

18 So, I mean, you're standing up here, I'm just
19 picking on you, because you're a smart guy and I like
20 you and I know you, so.

21 But this is for everybody: Why can't you do
22 that?

23 MR. WILLIAMS: We would be happy to sit
24 down and confer with Plaintiffs' counsel regarding any

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1 of these issues. I can tell you that the proposal that
2 resulted in the track to remand the Cabell County and
3 City of Huntington case to Judge Faber, and the
4 arrangements that were worked out regarding claims,
5 et cetera, have not been the subject of discussion,
6 regarding Ms. Chafin's request for the remand of those
7 cases that are currently before the MDL. But we're
8 happy to meet and confer with Plaintiffs' counsel.

9 JUDGE SWOPE: Why can't you all do that, on
10 this side?

11 Have some social distancing, sit apart, don't
12 breathe on anybody, and try to come up with a
13 commonsense way to fix this.

14 MR. WILLIAMS: We're happy to have that
15 discussion. I can't make any representations as to
16 whether they're going to be successful. But until those
17 proposals are before us, we can't really evaluate what
18 our position would be on those.

19 JUDGE MOATS: Well, you have to be willing
20 to talk.

21 MR. WILLIAMS: Sure.

22 JUDGE MOATS: In looking at the federal
23 MDL, Judge Polster -- and I've read as much as I could
24 read -- he has expressed his frustrations repeatedly.

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1 There seems to be little grounds for agreement. And I
2 understand stakes are incredibly high, probably as high
3 as they've ever been. I believe perhaps the tobacco
4 litigation, in years past, a big settlement. But so
5 contentious.

6 I mean these motions to dismiss with 600,
7 700 pages of exhibits, for what, to me, as far as a
8 plaintiff's burden, is hardly more than stepping over an
9 extension cord on the floor. It doesn't take much to
10 overcome a motion to dismiss. At least in our state.
11 Rarely.

12 But we spent weeks and weeks and weeks, on
13 thousands of pages of documents. And we anticipate --
14 not with pleasant thoughts -- probably having more to
15 deal with these 14 new cases.

16 So I would ask that you please consider all of
17 this, what you're really trying to do. The Supreme
18 Court is going to get tired of you coming for writs of
19 prohibition. But by all means, if that's what you want
20 to do, do it.

21 Some of these issues, perhaps they're much
22 more critical. This right to a jury trial, we believe
23 we're right. You believe we're wrong. It's an honest
24 difference of opinion. Take it up, if you want. Get

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1 together.

2 The Plaintiffs -- you can be seated,

3 Mr. Williams.

4 MR. WILLIAMS: Thank you.

5 JUDGE SWOPE: I just picked on you, but you
6 can have a seat.

7 JUDGE MOATS: Just a second.

8 I mean all these theories, the legal theories,
9 well, those are all well and good. But how much does a
10 case have to weigh before it collapses under its own
11 weight? How do you do this trial? A jury trial. It's
12 going to take six months, eight months, a year. And
13 that's perhaps just for one county or city, one
14 hospital. Most of us in here will no longer be
15 practicing law by the time it's all resolved.

16 We are making this much more complicated than
17 it really is. We are. We need to cut through it and
18 get to it. And we can do that. It's going to take
19 cooperation.

20 You all had the first mediation session two
21 weeks ago. I immediately read in the newspaper the next
22 day about the mediation session, and numbers and stuff.
23 That's not the purpose for a mediation. That causes
24 people to retract, retreat to their corners, and become

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1 overly cautious, as opposed to becoming overly
2 cooperative.

3 These things are confidential. There needs to
4 be a free and open exchange of positions, ideas.
5 Numbers need to be able to flow freely inside of the
6 mediation, not outside of the mediation. I see all this
7 stuff at a federal level. It's almost like that there's
8 a pipeline coming out. And I don't understand that.

9 I mean if this is not going to be tried to a
10 jury, it's certainly not for our benefit. We don't
11 care. I read that with bemusement, as does Judge Swope.

12 It serves no purpose. But the only result
13 that comes is distrust, lack of cooperation. I'm sure
14 when the Defendants read that in the newspaper, that the
15 fur on their necks stood up, they bristled. They
16 probably thought: Let's take a pause and step back.
17 We're going to need to rethink our level of cooperation.

18 That's not what it's all about. This can get
19 done. You all can do this. It can be resolved. It can
20 be resolved -- everything in this state can be resolved.
21 And I firmly believe that.

22 I've had most of the West Virginia attorneys
23 in front of me and in front of us many times in the
24 past. You all do a great job. But I am asking for a

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1 new level of cooperation, a new level of civility. I
2 want the citizens of our state to see the very best that
3 our legal profession has to offer. That we have one of
4 the greatest challenges, not just of our careers, but of
5 our lifetime, that we're in the middle of. It's
6 unlikely very many of our colleagues, whether they're
7 lawyers or judges, will ever be involved in something
8 like we are involved. It's something that your children
9 and your grandchildren will talk about.

10 JUDGE SWOPE: And if we had a jury trial,
11 they'll be trying it.

12 JUDGE MOATS: Exactly. And some of them
13 are going to be up here on the bench, presiding. Maybe
14 one of your grandchildren.

15 But that's not what our profession is all
16 about. And we cannot allow that to happen. And I'm
17 asking that all of you not allow that to happen.

18 MR. COLANTONIO: If I may?

19 JUDGE MOATS: Go ahead.

20 State your name, please.

21 MR. COLANTONIO: Mark Colantonio, I
22 represent 13 counties.

23 I just want to say I agree with the court, and
24 we've talked to our clients already about some of these

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1 issues, narrowing claims. I'm confident we can reach an
2 agreement with the Defendants and get this thing
3 narrowed down. I just wanted to say that.

4 JUDGE MOATS: You know, if I was one of the
5 defendants, I wouldn't do any -- I'd do what they're
6 doing.

7 You know, there's an old adage in criminal
8 law, criminal defense: That a continuance is the next
9 best thing to an acquittal.

10 There's an old adage in civil law, for
11 defendants: That a delay is the next best thing to a
12 defense verdict.

13 And if I was one of them, you can bet -- I'd
14 be like a football player with two minutes left, wanting
15 to slow down the other team. I'd feign injury; I'd do
16 anything to slow you all down.

17 One of them said it best. They agreed,
18 because you gave up something. And when you do, you
19 start coming closer together.

20 Plaintiffs, you haven't given up anything.
21 Nothing. Up to this point, it's been: Me, me, me, my,
22 my, my.

23 Well, they're not going to respond to that.
24 There's got to be give and take. So you all need to sit

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1 down among yourselves. And the Attorney General needs
2 to be a leader here, as opposed to: We need six months,
3 or two years, or whatever, to think about this.

4 That's not acceptable. And I want that
5 message to go out loud and clear. It is not acceptable.

6 All the Plaintiffs, all of them need to get in
7 a room. You need to discuss this. When you go in the
8 room, leave the egos hanging on the hook on the outside.
9 And discuss it openly, honestly, cooperatively, where
10 nobody has to have more credit than anybody. Let the
11 people of West Virginia have all the credit. And you
12 need to decide: If we are so confident in our case,
13 none of the rest of that stuff matters.

14 And it doesn't matter. Because the odds are
15 it's never going to come before us or any other judge.
16 Never. Can't happen. But public nuisance can. And
17 when you agree to do this, then these Defendants
18 probably are going to meet you at least halfway.
19 Because they know that they have at least narrowed down
20 what they are exposed to, so they know that they fight a
21 public nuisance battle, they're not going to have to
22 come back for round two through 200. And we can move
23 forward.

24 And I think that you will see, if you can

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1 start this and agree to this, that a new sense of
2 cooperation will emerge, and that can bring us closer to
3 resolving the entire litigation, as far as West Virginia
4 is concerned.

5 And that can also encompass these cases in
6 federal court in front of Judge Polster, because if all
7 of you go to Judge Polster and say, "Here's what we've
8 come up with for our state, and we ask you to approve
9 it," I would be very surprised if he would disagree.

10 That is our proposal.

11 I would like to know if anybody has any
12 thoughts about how frequently we should have status
13 conferences. We're willing to do whatever. We don't
14 want for this to become overly burdensome, for lots of
15 reasons, for all of you traveling and so forth. But we
16 want to be available to keep this case moving on track.

17 Mr. Linkous, do you have any thoughts?

18 Come to the microphone.

19 MR. LINKOUS: Tim Linkous, Your Honor, liaison
20 counsel, and far from being head honcho as well.

21 So I appreciate the invitation to speak. We
22 have talked, we believe that it would be good to have a
23 monthly status conference before this court, that at
24 least liaison and counsel and local counsel could

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1 appear. And if counsel from out of state want to appear
2 by Skype, that would be fine.

3 We also believe that we should have a regular
4 hearing or meeting with the discovery commissioner every
5 two weeks.

6 JUDGE MOATS: Okay.

7 MR. LINKOUS: We also would like this
8 court, if it so chooses, to establish a hearing date for
9 all the motions it's invited.

10 JUDGE SWOPE: Do you all want to travel to
11 Martinsburg, if you want to see Judge Wilkes every two
12 weeks?

13 MR. LINKOUS: Yeah, that's close to me,
14 Your Honor. So I'm in Martinsburg --

15 JUDGE SWOPE: I mean that's where he is.

16 JUDGE MOATS: And I think Judge Faber,
17 that's in his order; is it not?

18 MR. LINKOUS: I believe it is, Your Honor.
19 But we're willing to do that.

20 JUDGE MOATS: Okay. Well, our order is
21 pretty well going to mirror his order.

22 MR. LINKOUS: Yes.

23 And before I sit down, I just want to say I
24 appreciate the court's invitation to negotiate. We, on

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1 our side, have actually talked about this, about
2 approaching. So this is timely.

3 JUDGE MOATS: All right.

4 Who wants to speak on behalf of the
5 Defendants?

6 Mr. Jessee, are you here -- I'm sorry.
7 Mr. Williams.

8 JUDGE SWOPE: He is the big cheese, right?

9 MR. WILLIAMS: No, I think it's like the
10 short straw.

11 In regards to -- let me address the discovery
12 commissioner issue first.

13 Some of these issues might be able to be
14 handled not in person but over the phone, as disputes
15 arise.

16 JUDGE MOATS: Sure.

17 MR. WILLIAMS: So that would lessen the
18 burden of trying to get to Martinsburg, which is not
19 always easy.

20 We're happy to meet on whatever regular
21 schedule Judge Wilkes thinks is appropriate, and we'll
22 do that.

23 We think that the more judicial engagement
24 there is on these cases going forward, especially

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1 towards trial, the better, not only from the discovery
2 commissioner, but from the panel. So we would agree
3 with the Plaintiffs' recommendation that we have monthly
4 to six weeks' conferences with the presiding judges.

5 JUDGE MOATS: I mean we will do that. And
6 we will come up with a schedule going forward, over the
7 next year, so we have dates, as opposed to giving you a
8 date two or three weeks forward.

9 MR. WILLIAMS: In the AG cases that have
10 been filed against Janssen, my client, we have
11 requested -- and finding yesterday that once that
12 briefing is completed, I think at the end of March --
13 that we have oral argument on that. We'd be inclined to
14 have oral, or decide that on briefs. And so could that
15 be added to the agenda, at whenever the next status
16 conference is?

17 JUDGE MOATS: The answer to your question
18 is: We will look at it and decide whether we need oral
19 arguments, and if we believe we do, then we'll set it
20 for one of those regularly scheduled conference dates.
21 Okay?

22 MR. WILLIAMS: Okay. Very good.

23 JUDGE MOATS: Thank you.

24 MR. WILLIAMS: Thank you.

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1 JUDGE MOATS: One thing that I want to
2 bring up, just as a housekeeping matter. Some of the
3 items that have been served recently have just been
4 filed and served on me, they have not come to
5 Judge Swope or to Kim Fields, our mass litigation
6 manager. So how about please making a note that anytime
7 you file something, it needs to go to all three of us.
8 And you also need to, like any motions or responses or
9 other documents that are germane to that specific
10 filing, we would appreciate that.

11 Now, are there any other issues that we need
12 to be aware of or to consider?

13 Mr. Williams.

14 MR. WILLIAMS: One thing I was reminded by
15 Mr. Jessee. There's been a request on our side that
16 future conferences start at 9:00 a.m., to make it easier
17 for those that are coming in. They usually have to come
18 in the day before. It makes it easier, in terms of
19 return flights.

20 JUDGE MOATS: I have no problem with that.
21 I'm willing to start -- I'm usually up at 4:00 o'clock
22 every morning. I'll start at 5:00 if you want.

23 MR. WILLIAMS: I'm not sure we need to
24 start that early, Your Honor, but if that's what you

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1 want to do, we'll be here.

2 JUDGE SWOPE: And I usually don't get to
3 bed until 4:00 o'clock.

4 MR. WILLIAMS: Well, why don't we just
5 catch you on the way out, and Judge Moats on the way up.

6 JUDGE MOATS: That's true. He texts me
7 sometimes at 3:30 in the morning, and I text him back at
8 4:00.

9 From the Plaintiffs, is there anything else
10 that we need to bring up?

11 MR. LINKOUS: No, Your Honor.

12 JUDGE MOATS: Well, I appreciate it,
13 everybody. And I hope and trust that you will take to
14 heart what we have said, our suggestions. Because we
15 believe that this is possible, and we believe that you
16 all have the power to do this and make it happen.

17 I appreciate it. Everybody stay well. I'd
18 come down and shake hands, but instead we're going to
19 adopt the new sign-off. Good-bye.

20 * * *

21 (Whereupon, this hearing was concluded at
22 11:10 a.m.)

23 * * *

24

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1 THE STATE OF :
 WEST VIRGINIA :
 2 : SS: C E R T I F I C A T E
 COUNTY OF OHIO :
 3

4 I, CONNIE M. NICHOLS, Registered Professional
 Reporter and Notary Public within and for the State of
 5 West Virginia, duly commissioned and qualified, do
 hereby certify that the proceedings within were by me
 6 reduced to stenotype; afterwards reduced to Computer
 Aided Transcription under my direction and control; and
 7 that the foregoing is a true and correct transcription
 of the proceedings within.

8
 I do further certify that these proceedings
 9 were taken at the time and place in the foregoing
 caption specified, and were completed without
 10 adjournment.

11 I do further certify that I am not a relative,
 counsel or attorney of either party, or otherwise
 12 interested in the event of this action.

13 I, to the best of my ability, do further
 certify that the attached transcript meets the
 14 requirements set forth within Article 27, Chapter 47 of
 the West Virginia Code.

15
 IN WITNESS THEREOF, I have hereunto set my
 16 hand and affixed my seal of office at Wheeling,
 West Virginia, on the 20th day of March 2020.

17
 18 

19 CONNIE M. NICHOLS, RPR
 Notary Public within and for
 20 the State of West Virginia

21 My commission expires:
 October 16, 2021
 22
 23
 24

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